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May 21, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CS Docket 96-46

Dear Mr. Caton:

Pursuant to 47 C.F.R. § 1.1206, I submit this original and one copy of a letter disclosing a written and oral ex parte presentation in the above-captioned proceeding.

On May 21, 1996, the undersigned, James N. Horwood, Karen Edwards, and Todd Paglia, on behalf of the Alliance for Community Media, the Alliance for Communications Democracy, the Center for Media Education, the Consumer Federation of America, People for the American Way, the Consumer Project on Technology, and the Office of Communication of the United Church of Christ, met with Suzanne Toller, counsel to Commissioner Rachelle Chong. Tillman Lay, Esq. and Rick Ellrod, Esq., of the law firm of Miller, Canfield, Paddock and Stone also attended the meeting as observers on behalf of the National League of Cities et al

The meeting dealt with various proposed regulations regarding open video systems, including matters set forth in the attached talking points and additional support materials, which were handed out at the meeting.

Sincerely,

Jeffrey S. Hops
Director, Government Relations

Enclosures:

cc: Commissioner Rachelle Chong
Suzanne Toller, Esq.
James N. Horwood, Esq.
Todd Paglia
Karen Edwards, Esq.
Tillman Lay, Esq.
Rick Ellrod, Esq.

TALKING POINTS FOR FEDERAL COMMUNICATIONS COMMISSION

1. OVS is one of four ways a telephone company can get into the video business; Congress did not intend for it to be the only way. The Commission should not be cowed into believing that OVS must become the dominant means for local exchange carriers to offer video services.

2. RBOCS state that Congress wants OVS to be successful, but they don't say why. Congress wanted OVS to be successful because it is intended to offer meaningful opportunities for third party access. If it fails to meet this requirement, it can't be called successful, even if it is used by the entire industry.

3. OVS should succeed -- but it should succeed because it offers video customers a distinctly different type of product. The RBOCs are using the imperative that OVS succeed at any price as a transparent ploy to undercut Title VI regulation.

4. RBOCs can get into cable right now, and do so on a regulatory level playing field. US West has bought Continental, and other RBOCs own significant chunks of other MSOs. RBOCs cannot claim they will not enter the video services market unless they are induced by favorable OVS rules. They are already active participants in the video services market.

5. The RBOCs are trying to suggest that OVS systems will always be overbuilds competing with existing cable operators. But there is no reason for this to be the case. We believe that the paradigm is more like the US West buyout of Continental -- a local exchange carrier will take a cable system and request that the commission call it OVS. It is this paradigm that should govern the Commission's thinking. If less regulation were required as an incentive to overbuild, then privileges should be triggered by overbuilding. But the commission is prohibited by law from conditioning OVS certification on this. The Commission should not use a competitive paradigm where one will probably not arise.

6. OVS will consequently only provide regulatory relief for monopolistic providers in most instances.

7. Market forces will not lead to competition where they have not done so already. Regulatory reduction will only lead to entrenchment of monopolistic providers. Allowing cable companies to switch to OVS will not lead to fair competition, but will simply make MSOs more likely targets for RBOC buyouts.

8. The Cable Bureau's experience with regulating leased access on cable illustrates the difficulties the Commission faces in persuading video providers to permit nondiscriminatory third-party access.

9. The RBOCs are asking the Commission to give OVS operators editorial control through the back door by permitting any discrimination which comports with their marketing plan. The Commission cannot permit this to happen This defeats the purpose of OVS, which was to create a platform accessible to programmers not of the operator's choosing.

10. The Commission should not be disingenuous about the efficacy of dispute resolution as opposed to issuing sensible regulations. The dispute resolutionprocess always favors the party with the most financial resources. A small town in Minnesota is not in a financial position to take all its disputes with US West to the Commission. But the Commission can issue bright-line rules and revoke certification if the town in Nebraska files a complaint with the Commission -- a much less cumbersome administrative procedure.

11. RBOCs are asking for the authority to discriminate as to access. They should be required to provide examples of what they consider to be reasonable discrimination. In the absence of such statements, we can only assume that they mean "ad hoc" or "arbitrary." Certainly the standard "reasonably required to enable the system to compete effectively" is no standard at all -- particularly when there is no competition.

12. Non-discriminatory rates and non-discriminatory access require some form of rate regulation. In exempting OVS from Title II, that is all they did -- but use of Title-II like language clearly implies that some form of regulation is authorized, even if not precisely like Title II.

13. Public disclosure of contracts is a sine qua non for a determination of whether a contract is reasonable; there is no way to make such discrimination apparent without comparing it to the terms and conditions offered other providers, including the OVS platform operator's own affiliate. Permitting any entity to have access at terms disclosed by a previous contract is an excellent way to prevent discrimination without engaging in rate regulation activities. And requiring to offer the same rates to others as it offers to its own affiliate will provide further assurances that the rates charged are fair.

14. We are not asking the Commission to require OVS operators to negotiate with franchise authorities -- but we believe they will want to in order to build a cooperative arrangement for joint provision of PEG services in those areas where OVS is an overbuild.

15. It is both technically and economically feasible to provide franchise-specific PEG narrowcasting. Cable operators are able to offer it profitably -- there is no reason why OVS operators cannot do so too -- as long as they are aware of that requirement in advance.

16. Section 611, read in its entirety, clearly encompasses the authority to require capacity, services, facilities and equipment -- otherwise, Section 611(c) would be surplusage in the context of the OVS statute. The RBOCs interpretation that services, facilities and equipment are not required clearly contravene Congress' intent that such services be offered to extent neither greater nor lesser than their cable system counterparts.

RON WYDEN
OREGON

United States Senate

WASHINGTON, DC 20510-3703

May 20, 1996

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M St. NW
Washington DC, 20554

Dear Chairman Hundt:

It is my understanding that the Cable Services Bureau of the Commission is in the process of promulgating rules, due by August 6, 1996, implementing the "Open Video Systems" provisions of the Telecommunications Act of 1996, PL. 104-104 (302(1996).

Congress' intention in passing this provision was to allow voices that currently have limited or no access to a video platform, whether broadcast, cable, DBS, or "wireless cable," to create and show television programming subject to terms, rates, and conditions that are fair and reasonable. These voices include those of elementary and secondary schools, churches and synagogues, charitable institutions, local governing bodies and state and local agencies.

With regard to PEG access on OVS systems, it is my hope that it would at least equal the level of access, services, facilities, equipment and support available to PEG access centers on cable systems and that the rates charged, if any, are the lowest available. The rules should also ensure that access to video platforms by programmers unaffiliated with the OVS platform operator is available.

The 1996 Telecommunications Act should open exciting new vistas for meaningful electronic expression by schools, nonprofit, churches, community support organizations, and governmental bodies and agencies. I believe, however, that this will only happen if the Commission follows Congress' intent. I therefore urge you to give special attention to the regulatory comments of the Alliance for Community Media, Consumer Federation of America, and People for the American Way in this rulemaking, and to approve regulations which guarantee meaningful opportunities for access to the OVS platform by all Americans.

Sincerely,

Ron

RON WYDEN
United States Senator

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OPEN VIDEO SYSTEMS
(CS Docket No. 96-46)

April 26, 1996

National League of Cities; United States Conference of Mayors; National Association of Counties; National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; City of Los Angeles, California; City of Chillicothe, Ohio; City of Dearborn, Michigan; City of Dubuque, Iowa; City of St. Louis, Missouri; City of Santa Clara, California; and City of Tallahassee, Florida

I. OVS MUST BE MORE THAN CABLE IN DISGUISE

- A LEC can always be a cable operator. Thus, the purpose of OVS is not merely to promote competition, but to provide a new alternative model.

- The Commission is not responsible for ensuring that OVS will succeed in the market, but only for ensuring that OVS will meet the statutory requirements. The market will determine whether it succeeds.

- Thus, the Commission's role is not that of a cheerleader for OVS, but to ensure that it is a true open system.

- The ten-day time limit for certification approval implies, not that FCC approval must be a meaningless rubber stamp, but that LECs must do their homework first, so that the FCC can do its job quickly.

    - No LEC will rush into an investment of this magnitude without extensive prior preparation. There is no reason the LECs cannot use this same pre-certification period to prepare a fully informative application (including, for example, the necessary local consents).

- Our approach places the burden of preparing the necessary information on those who have, not only the information, but also the greatest incentive for speed: the LECs.

- The LECs' reliance on the supposed failure of VDT is misplaced.
  - VDT was constrained by the cross-ownership ban. That was the major problem.
  - LECs prefer the cable model, as they have acknowledged. VDT was a square peg in a round hole.
  - The LECs evidently decided to wait for a better deal from Congress or the courts.

II. THE COMMISSION MUST ADOPT STRONG NONDISCRIMINATION RULES.

- The LECs have admitted they will discriminate if they can, to make OVS resemble a wholly-controlled cable system.

- Thus, the FCC can give no credence to the LECs' pleas that potential discrimination problems are merely "hypothetical." Reply comments of NYNEX at 9; USTA at 4. LECs have openly admitted their desire to keep independents off OVS if they are allowed to do so.

- The overall approach of Bell Atlantic et al. is to avoid any notion of intra-system competition among programmers. Rather, the LECs appear to view OVS as a cozy niche dominated by the OVS operator for its own benefit and that of a few close allies. Reply Comments of Bell Atlantic et al. at 6.

- LECs continue to confuse three different markets: (1) the market for ***carriage***, which is where the nondiscrimination and reasonable rate rules apply; (2) the market for ***programming resale***, which is comparable to the existing cable operators' dealings with its programmers; and (3) the ***subscriber*** market. *See, e.g.*, Reply Comments of Bell Atlantic et al. at 16-17; NYNEX Reply Comments at 8-9; USTA reply comments at 6-7. Competition in (2) or (3) will ***not*** create competition in (1), where the OVS operator stands alone.

- The LECs oppose "Title II-like regulation."

  - Congress directed (a) that Title II does not apply directly, and (b) that the FCC cannot simply import or cross-reference its Title II regulations in OVS.

  - But this cannot prevent the FCC from drawing on Title II-*like* concepts, such as nondiscrimination and reasonable rates, *as necessary* to implement the statute.

  - If Congress had wished to exclude such concepts altogether, Congress would not have used them in the statute, as it did, to define an open video system.

- **Public disclosure of contracts** is the only practical way for an independent video programming provider to know it is being discriminated against.

- Making the contracts available through discovery is not sufficient. Such a scheme makes it too easy for LECs to impose a stiff entry barrier to independents, in the form of costly litigation needed even to find out if there is discrimination.

- **Rates** must be set on a uniform basis, pending justification of any differences by the OVS operator.

  - U S West claims that we wish to impose tariffs. Reply comments at 7 & n.20. This is untrue.

  - Rather, the challenge is to craft rules that work as well as tariffs to ensure reasonable and nondiscriminatory rates, while using as little tariff-like machinery as possible.

  - The key steps in such rules must be

    (1) presumption that rates must be equal absent a full explanation, and
    (2) public disclosure.

  - Our comments at 21 n.27 distinguish such an approach from tariffing.

  - Bell Atlantic et al. want to charge different rates based on the market value of the ***programming*** offered. Reply Comments of Bell Atlantic et al. at 18. In other words, the LEC would not only make a profit on the carriage, but also capture the programmers' profits on the quality of their programming.

  - NYNEX complains about potential discrimination by programmers. Reply comments at 14-15. This is inconsistent with NYNEX's demand to be allowed to discriminate itself as an OVS operator, and illustrates the self-interested motive of LECs' one-sided demands for "flexibility."

III. OVS SHOULD MEET PEG REQUIREMENTS THROUGH A "MATCH OR NEGOTIATE" REQUIREMENT.

- LECs wish to be able to provide "equivalent" PEG carriage in different ways. Reply Comments of Bell Atlantic et al. at 26-27; USTA reply comments at 6. This is why we advocate making available the "negotiate" option.

- Bell Atlantic et al. claim that such negotiation would reimpose the franchise requirements of § 621(a)(4)(B). This is untrue, because an OVS operator that wishes to avoid negotiations can always match the incumbent cable operator.

- The two options together allow for appropriate "flexibility." However, the LECs favor such flexibility only when it is to their advantage.

IV. CABLE OPERATORS SHOULD NOT BE PERMITTED TO BECOME OVS OPERATORS, BUT IF THEY ARE, SEPARATE AND PRIOR LOCAL APPROVAL WILL BE NECESSARY.

- Nothing in the Act authorizes cable operators to abrogate their contracts with local communities.

- Thus, local community approval would be necessary for any conversion of a cable system into an OVS.

V. THE CERTIFICATION PROCESS MUST ENSURE THAT AN OVS COMPLIES WITH LOCAL RIGHTS REGARDING THE PUBLIC RIGHTS-OF-WAY.

- Legal arguments regarding the takings issue are addressed in a separate memorandum.

- To prevent involvement of the FCC in Fifth Amendment litigation, any OVS approval must specifically condition such approval on obtaining and maintaining the necessary consents.

- Bell Atlantic et al. appear to argue that certification cannot include such factors as right-of-way authorization. Reply Comments of Bell Atlantic et al. at 25, 29 n.72. This is incorrect.

    - The certification language in the statute is not exclusive. It does not prevent the FCC from requiring the information necessary to ensure that the statutory objectives are fulfilled.

    - Bell Atlantic et al. claim that the certification can cover § 653(b) requirements, but not 653(c). Reply Comments of Bell Atlantic et al. at 25, 27. But § 653(c)(2)(A) makes clear that the FCC implements the 653(c) requirements ***in*** the § 653(b)(1) rulemaking. Thus, the LECs' proposed distinction cannot hold: the requirements of subsection (c) are subsumed in those of (b).

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OPEN VIDEO SYSTEMS
(CS Docket No. 96-46)

May 14, 1996

National League of Cities; United States Conference of Mayors; National Association of Counties; National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; City of Los Angeles, California; City of Chillicothe, Ohio; City of Dearborn, Michigan; City of Dubuque, Iowa; City of St. Louis, Missouri; City of Santa Clara, California; and City of Tallahassee, Florida

I. MAKING OVS WORK: PROPOSED REGULATIONS

- Open Access
  - Ensure access to capacity for independent video programming providers: *Proposed Rules, § 8*
  - Ensure reasonable and nondiscriminatory terms and conditions: *Proposed Rules, § 9*
  - Ensure reasonable and nondiscriminatory rates: *Proposed Rules, § 10*
- Certification Process
  - Adequate preparation by applicant to enable expedited FCC review: *Proposed Rules, § 4(b)*
  - Public notice and comment: *Proposed Rules, §§ 4(a)(2), 5*

- Enforcement of FCC Regulations
  - Annual report to enable detection of potential violations: *Proposed Rules, § 6*
  - FCC investigation: *Proposed Rules, § 14(a)-(c)*
  - Remedies: decertification, fines or forfeitures: *Proposed Rules, § 14(d)*
  - Dispute resolution process for carriage complaints: *Proposed Rules, § 15*
- PEG Access Requirements
  - OVS operator options: "Match or negotiate": *Proposed Rules, §§ 4(b)(4), 12(b)(2), 12(d)*
  - Types of PEG obligations: channel capacity, services, facilities, and equipment. *Proposed Rules, § 12(a), (d)*
  - Tracking community needs and interests: *Proposed Rules, § 12(a)-(e)*
- Fee In Lieu of Franchise Fee: *Proposed Rules, § 11*
- Cable/OVS Relationship
  - Cable operator as OVS operator: *Proposed Rules, § 3(b)*
  - Cable operator as independent video programming provider: *Proposed Rules, § 8(f)*
- Right-of-Way Issues
  - Effect of Commission approval of certification: *Proposed Rules, §§ 4(b)(3), 5(e)(2)*
  - State and local law governs disputes over right-of-way authority. *Proposed Rules, § 15(a)(2), (b)(2)*

II. LECS WILL SET CARRIAGE RATES TO EXCLUDE INDEPENDENT PROGRAMMING PROVIDERS UNLESS THE COMMISSION'S RULES ENSURE THAT RATES ARE REASONABLE

- The LECs have admitted they will discriminate if they can, to make OVS resemble a closed cable system.
  - The LECs oppose *any* formula to evaluate the reasonableness of carriage rates. *See, e.g.*, Joint Parties' May 2, 1996, Letter to Cable Bureau at 1.
  - The LECs also oppose result-based criteria to determine whether their carriage rates actually permit independent video programming providers to use the ostensibly open system, such as the "yardstick" test proposed in *Comments of the National League of Cities et al.* at 20 (April 1, 1996).
- Instead, the LECs seek additional rules to place burdens on independent VPPs and to protect OVS operators.
  - The LECs advocate a "safe harbor" in which rates are *conclusively* presumed reasonable. *See* Joint Parties' May 2, 1996, Letter to Cable Bureau at 2.
    - Presence of a single unaffiliated video programming provider ("VPP") is woefully insufficient to ensure that rates are reasonable. An OVS operator could enter into a "sweetheart deal" or tradeoff arrangement with a friendly unaffiliated VPP so as to exclude all other unaffiliated VPPs — particularly if "unaffiliated" VPPs are permitted to have relationships other than a carrier-user relationship. For example, U S West and Continental could agree to serve reciprocally as each others' single "unaffiliated" VPP in their respective markets.
    - Thus, an OVS operator could readily reach an arrangement with its single unaffiliated VPP allowing rates too high for true independent VPPs to afford, through a "back-door" deal that would reduce the true cost to the favored VPP. Such an arrangement would be even easier to conceal if, as the LECs request, the OVS operator need merely charge affiliated and unaffiliated VPPs prices that are "equivalent" (not equal) for carriage of *similar* programming under *similar* circumstances — criteria so loose that the OVS operator could claim they would be

met by almost any rates. *See* Joint Parties' May 2, 1996, Letter to Cable Bureau at 2.

- The LECs suggest that OVS operators should be able to use *unpublished* rate cards to expand this safe harbor and further discourage complaints. Joint Parties' May 2, 1996, Letter to Cable Bureau at 2-3.

  - The LECs offer no rationale why carriage rates to favored VPPs would become more reasonable — much less why they should be *conclusively* presumed reasonable — if the LEC had the rates engraved on unpublished rate cards.

  - If, as the LECs argue, contracts at rates different from those on the rate cards would also be presumed reasonable, it is difficult to see how such a rate card could help "ensure that the rates, terms, and conditions for such carriage are just and reasonable." 1996 Act § 302(a) (adding new § 653(b)(1)(A)).

- The LECs would place the burden on an independent VPP to provide evidence of discrimination, even though the necessary information is in the possession of the OVS operator.

  - The LECs' rules would require an independent VPP to allege in its complaint with particularity, and with substantial evidence, that the operator *intentionally* treated it *substantially* differently from other *similarly situated* VPPs; that such treatment was commercially unreasonable; and that such treatment caused the complainant actual and substantial harm (§ 10(c)(1), (f)(1)(G)-(I)).

  - Yet the only way an independent VPP could acquire such evidence under the LECs' rules would be through an FCC discovery order — which would not be issued until *after* such a complaint were filed and met the LECs' stringent pleading standards (§ 10(j)).

  - Even if an independent VPP could obtain an unpublished rate card, such a card would show only one possible rate, and would not allow an independent VPP to determine whether other VPPs had received more favorable rates, terms, or conditions. Joint Parties' May 2, 1996, Letter to Cable Bureau at 2-3.

- Thus, the LECs' dispute resolution procedure is designed to hinder and prevent independent VPPs from bringing complaints — despite the fact that the LECs would have the Commission avoid all specific rules or tests and depend solely upon this one-sided procedure to ensure just and reasonable carriage rates.

III. THE LECS SEEK TO INDUCE THE COMMISSION TO INTERFERE WITH STATE LAW SO AS TO EFFECT A TAKING.

- Under the LECs' proposed rules, the Commission would claim to authorize use of local public rights-of-way regardless of any limitations on the scope of any existing authority a LEC may have. Joint Parties' May 2, 1996, Letter to Cable Bureau at 3.

- The scope of any grant of authority to use the public rights-of-way is determined by state and local law and the specific language of such grants. Any ambiguity in such a grant is to be construed in favor of the grantor and against the grantee. *See, e.g.*, 37 C.J.S. § 21(b), p. 167 (1995), citing *inter alia Broad River Power Co. v. State of South Carolina ex rel. Daniel*, 281 U.S. 537, 50 S. Ct. 401, 404, *aff'd on reh'g*, 282 U.S. 187, 51 S. Ct. 94 (1930).

- Adoption of the LECs' proposed rule to preempt such grants would represent a Fifth Amendment taking, paid for by federal taxpayers rather than by the LECs.

- Congress did not authorize such a taking, nor provide for compensation for the market value of such property. The LECs' proposed approach would unnecessarily delay the introduction and market test of OVS by provoking constitutional litigation.

- The OVS regulatory scheme releases OVS operators from numerous federal regulations. If this incentive is not sufficient to induce LECs to choose OVS over cable (as the LECs suggest, Joint Parties' May 2, 1996, Letter to Cable Bureau at 3), the LECs are free to become cable operators instead.

COMPARISON OF PROPOSED OVS RULES

NATIONAL LEAGUE OF CITIES ET AL.

COMPARISON OF PROPOSED OVS RULES

NATIONAL LEAGUE OF CITIES ET AL.

Statutory Requirement	NLC et al. Proposal	LEC Proposal
Open Access		
Ensure access to capacity for IVPPs § 653(b)(1)(B)	Open access. § 8(a)(1)	When demand exceeds capacity, operator may refuse carriage, reduce its capacity. § 6(a) nn.1, 2 Operator not required to reduce its capacity below 1/3. § 6(a) n.1
• Access to both analog and digital capacity as applicable	Open, nondiscriminatory access to capacity of both types. §§ 8(c)(1), 9(b)	
• Channel counting	PEG & must-carry channels count neither in total nor in 1/3 share. § 8(c)(2)(A) Shared channels count according to number of sharers. § 8(c)(2)(B)	PEG & must-carry channels count in total, but not in 1/3 share. § 6(b) n.2 Shared channels count in total, but not in 1/3 share. § 6(b) n.2, § 6(d) n.
• Availability of initial capacity	Capacity assigned proportionately. § 8(b)(1)	
• Subsequent availability of capacity	Operator must provide capacity in 30 days if less than 2/3 occupied by IVPPs. § 8(b)(2) Capacity rights assignable among IVPPs. § 8(e)	
• Reasonable maximum capacity requirements	No limit less than 1/3 unless IVPP demand exceeds 2/3 capacity. § 8(d)(2)	If demand exceeds capacity, neither operator nor IVPP controls more than 1/3. Operator may limit IVPPs to 1/3. § 6(b) & n.1

Statutory Requirement	NLC et al. Proposal	LEC Proposal
• Reasonable minimum capacity requirements	Single-channel and part-time capacity to be made available. § 8(d)(1)	
• Definition of IVPP	(1) Provides video programming of its own selection through carriage agreement, and (2) has no financial or business relationship with operator other than carrier-user relationship. § 2(c)	Unaffiliated. *E.g.*, § 6(b) n.1.
Ensure reasonable and nondiscriminatory terms and conditions § 653(b)(1)(A)	Nondiscrimination principle. § 9(a)	Nondiscrimination principle. § 6(a)
• Reasonable financial conditions for IVPP		Operator may impose reasonable requirements for creditworthiness and financial stability. § 6(a)(1)
	Operator may impose no minimum contract term more than one month or maximum less than one year. § 8(d)(3)	Operator may require minimum contract periods. § 6(a)(1) n.3
	Operator may require two months' carriage charges in advance. § 9(g)	Operator may require security deposits. § 6(a)(1) n.2
	No discrimination based on financial qualifications. § 9(g)	Operator may create classes based on creditworthiness or financial stability. § 6(a)(1) n.1
• Nondiscriminatory channel positioning § 653(b)(1)(E)(i)	No unreasonable discrimination in positioning, material provided, or identification. § 9(d)	Operator may not unreasonably discriminate in material provided, but must pass through identification. § 6(e)

Statutory Requirement	NLC et al. Proposal	LEC Proposal
• Prevent discrimination in shared channels § 653(b)(1)(C)	Any channel offered by more than one VPP to be carried on shared channel. § 9(d)	Operator may carry channels offered by more than one VPP on shared channel. Operator administers channel sharing. § 6(d)
• Prevent discrimination in marketing	Operator may independently offer programming also offered by IVPPs. § 9(e)	Operator may offer all IVPP programming as well as its own. § 6(c) n.
• Prevent discrimination in technical requirements	Operator may set reasonable technical standards. § 9(h)(2) Necessary technical and similar information must be made available to VPPs. § 9(f)	Operator may require evidence of ability to meet technical standards. § 6(a)(3)
• Other reasonable conditions	Operator may require evidence of lawful access to programming, indemnification. § 9(h)(1) Operator may require timely provision of programming. § 9(h)(3)	Operator may require evidence of lawful access to programming prior to carriage agreement. § 6(a)(2) Operator may require reasonable assurances of timely provision of programming. § 6(a)(4)
Ensure reasonable and nondiscriminatory carriage rates § 653(b)(1)(A)	Rates must be just and reasonable, and not unjustly or unreasonably discriminatory. § 10(a)-(b)	Rates must be just and reasonable, and not unjustly or unreasonably discriminatory. § 6(a)
• Access to information about rates	Open pricing; carriage rates filed with FCC. § 10(d)	FCC may order discovery. § 10(j) Documents submitted in disputes may be protected as proprietary. § 10(k), (g)(5)(D)

Statutory Requirement	NLC et al. Proposal	LEC Proposal
• Uniform rates	Operator must justify rate differences based on 47 U.S.C. §§ 531, 534, 535; costs of carriage; nonprofit status. § 10(e)(1) No discrimination based on content. § 10(e)(2) "Most favored nation" clause. § 10(e)(3) De minimis differences may be elected by any VPP. § 10(h)	Operator must state its reasons for any differential. § 10(g)(5)(C) Operator may impose price differences up to $.05/subscriber or 5% as de minimis without further justification. § 10(g)(5)(B)
• "Reality check" yardstick to gauge reasonableness of rates	Rates presumed *unreasonable* unless: • At least four IVPPs • At least 1/3 of capacity used by IVPPs. § 10(f)	"Safe harbor": rates conclusively presumed *reasonable* if • At least one IVPP • rates to IVPPs equivalent to those charged to affiliates for similar programming under similar circumstances. Joint Parties' May 2, 1996 letter to Cable Bureau at 2
• Correction of unreasonable rates	FCC may set rates based on cost and reasonable rate of return. § 10((g) If FCC does not act, operator must ratchet rates down by 10% increments until yardstick requirements satisfied. § 10(g)	FCC may establish rates, terms and conditions. § 10(v)(1)
• Changes in rates	Once annually, with 30 days' notice. § 10(c)	

Statutory Requirement	NLC et al. Proposal	LEC Proposal
Must-carry, sports exclusivity, network non-duplication, syndicated exclusivity, etc. § 653(b)(1)(D), (b)(2)	Application of Part 76 provisions. § 7	Application of Part 76 provisions. §§ 5, 6(e), 7-8
Certification Process	§ 653(a)(1)	
Access to filings; public notice	Submission in paper and electronic forms. § 4(a)(2) Posting in reference room and on Internet. § 5(a)(1) Notice by electronic mailing list. § 5(a)(2)	FCC to publish notice. § 4(b)
Basic information permitting FCC to process certification	Name(s), form, contact, communities served, date of service, affiliated LECs. § 4(b)(1)(A)-(E)	Name(s), form, responsible partner, contact, communities served, date of service. § 4(c)(1)-(6)
Certification of LEC status	Yes. § 4(b)(1)(F)	
Certification of compliance with FCC rules	Yes. § 4(b)(2)	Yes. § 4(a), (c)(6)
Certification of open access	List of IVPPs. § 4(b)(5) Carriage contracts. § 4(b)(6)	
Certification of compliance with PEG requirements	Yes. § 4(b)(4)	
Certification of compliance with any applicable right-of-way requirements	Yes. § 4(b)(3)	

Statutory Requirement	NLC et al. Proposal	LEC Proposal
FCC processing of certification	Public comment. § 5(b) Notice of facial incompleteness. § 5(c) 10-day time limit. § 5(d)	 10-day time limit; FCC inaction deemed approval. § 4(b)
Enforcement	§ 653(b)(1)	
FCC authority	No OVS without FCC's authorization. § 3(c) Approval subject to continued compliance and review. § 5(e)-(f)	OVS exempted from all FCC rules except as specifically provided. § 3
• Reporting requirements to monitor discrimination	Annual report. § 6	
• FCC investigation	FCC may investigate upon complaint or by own motion. § 14(a)(1) FCC will investigate if • yardstick test not satisfied • affiliate fails to earn reasonable ROR • no MFN clause in carriage contract • inconsistent rates, terms, conditions • FCC aware of potential violation Operator shall respond to FCC's information requests. § 14(c)	
• Effect of inaction	No right created by inaction. § 14(b)	

Statutory Requirement	NLC et al. Proposal	LEC Proposal
• Remedies for violation of FCC regulations	• Decertification, after notice and opportunity to respond (decertified operator must obtain cable franchise). § 14(d)(1) • Fines or forfeitures. § 14(d)(2) • Other lawful remedies. § 14(d)(3)	
Dispute resolution process § 653(a)(2)	Applies to carriage disputes, not right-of-way issues. § 15(a)(1)-(2), (b)(2)	Applies to VPPs. § 10(a)
	Parties may seek other remedies. § 15(a)(3)	Operator may require IVPP to submit to ADR prior to FCC action. § 10(b)
	Operator has burden of proof. § 15(c)	Complainant shall allege (1) intentionally different treatment, (2) such treatment commercially unreasonable, and (3) actual and substantial harm. § 10(c), (f)(1)(G)
	§ 180-day time limit. § 15(e)	180-day time limit. § 10(a)
	Service on affected parties. § 15(b)(3)	Service on affected parties. § 10(o)
		Complainant must notify operator and allow at least 10 days to respond. § 10(d)
		Detailed pleading requirements imposed on complainant. § 10(e)-(i), (*l*), (n)
		Documentary evidence or affidavit required with complaint. § 10(f)(1)(H)

Statutory Requirement	NLC et al. Proposal	LEC Proposal
		Other detailed procedural requirements. § 10(m), (p)-(s) Sanctions for frivolous complaints. § 10(t) One-year statute of limitations. § 10(u)
	FCC may award carriage, damages, or both. § 15(f)	FCC may order appropriate remedies. § 10(v) Operator not liable for damages accruing after 180-day limit. § 10(a)
PEG Access / Title VI	§ 653(c)(1)(B), (2)(A)	
No greater or lesser than cable operator	"Match or negotiate." §§ 4(b)(4), 12(b)(2), 12(d) LFA to designate rules and procedures for operator use of unused PEG capacity (as Cable Act). § 12(g) No editorial control. § 12(h)	Operator to designate capacity for PEG use. § 6(f) Operator may use unused PEG capacity. § 6(f)(5) No editorial control, except re obscene, indecent, or similar material. § 6(f)(6)
• Types of PEG obligations	Channel capacity, services, facilities, or equipment. § 12(a), (d)	Capacity only. § 6(f)
• Technical facilities to enable access	Special conversions required by system to be provided by operator. § 12(f)	
Consistent with local community needs and interests	LFA sets PEG requirements for each franchise area independently. § 12(a)-(b)(1), (e)(2)	Operator's provision of PEG capacity not subject to regulation by LFA. § 6(f)